

ISSUES

In his December 27, 2011, Order for Medical Treatment (Order), the ALJ stated:

Medical treatment is granted and ordered paid on claimant's behalf by respondent and insurance carrier with referral to Brigham and Women's Hospital for evaluation of right arm transplant until further order. Decision regarding claimant's suitability for transplant should be made by medical personnel.

Claimant asks the Board to affirm the ALJ. He asserts that the Board does not have jurisdiction to hear this matter. If the Board finds it does have jurisdiction, claimant argues the proposed evaluation is reasonable and necessary. Respondent asserts the ALJ exceeded his jurisdiction by ordering the medical treatment and, therefore, the Board pursuant to K.S.A. 2010 Supp. 44-551(i)(2)(A) may review the ALJ's preliminary Order.

1. Does the Board have jurisdiction to review the ALJ's preliminary Order? Specifically, did the ALJ exceed his jurisdiction by ordering an evaluation of claimant by B&WH?

2. If so, did the ALJ err by ordering medical treatment which included referring claimant to B&WH for a possible right arm transplant?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was injured in a motor vehicle accident on May 12, 2006, while working for respondent. As a result of the accident, claimant had a partial amputation of the right arm approximately one inch below the right elbow. Claimant now has a prosthetic device. The prosthetic arm has a mechanical elbow that can swing freely with five terminal devices, including three hands, a clamp and a hook. He also has several activity arms, which let him participate in various activities. However, due to spinal stenosis and/or low back pain, claimant cannot use all of the activity arms.

Claimant testified he needs assistance with putting on his pants and shirt, as he cannot zip his pants or button his shirt. Claimant cannot cook and "opening jars and lids is sometimes very near to impossible."¹ Claimant testified that if he had a total arm replacement and recovered more use of his right arm, he could perform daily activities and return to more work activities.

Claimant attended the Amputee Coalition of America conference in Kansas City in June 2011, where he learned of an arm transplant procedure. Claimant testified he met

¹ P.H. Trans. (Dec. 22, 2011) at 16.

with Dr. Bohdan Pomahac, a surgeon at B&WH, at the convention and they discussed claimant's medical conditions, which include Type I diabetes, peripheral neuropathy and a medical history of heart attack. Dr. Pomahac invited claimant to B&WH for a "prescreening process."² Claimant testified that he probably is not capable of traveling alone to Boston for the prescreening process.

Claimant's current authorized treating physician is Dr. Mindi S. Garner, an internal medicine physician. On June 21, 2011, she sent a letter to Dr. Pomahac requesting claimant be assessed for a right arm transplant. The referral letter listed claimant's medications, allergies and diagnoses. Dr. Garner testified the right arm transplant was claimant's idea and stated: "Any time a patient requests a reasonable option and in my medical opinion, I feel like they need a formal assessment for them to make that decision, I make that consult referral."³ Dr. Garner opined that within a reasonable degree of medical probability her referral of claimant to Dr. Pomahac was reasonable and necessary medical treatment to cure and relieve the effects of claimant's work-related injury.

PRINCIPLES OF LAW AND ANALYSIS

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁴ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply.

The issue whether a worker is entitled to medical benefits is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, whether medical treatment ordered by an ALJ in a preliminary Order is reasonable and necessary is not a reviewable issue. In *Lewis-Spiller*,⁵ claimant's treating physician referred claimant to another physician for an experimental procedure. The ALJ ordered respondent to provide the experimental treatment. In *Lewis-Spiller*, the underlying issue was not whether claimant met with personal injury arising out of and in the course of employment. Nor was the issue whether the requested medical treatment was for injuries which were not causally related to the work-related accident. Instead, respondent argued the experimental treatment was not

² *Id.*, at 24.

³ Garner Depo. at 16.

⁴ K.S.A. 2010 Supp. 44-551.

⁵ *Lewis-Spiller v. Conagra Foods*, No.1,008,929, 2004 WL 237683 (Kan. WCAB Jan. 23, 2004).

appropriate. In *Lewis-Spiller*, a Board Member found the Board did not have jurisdiction to review the matter. The facts in *Lewis-Spiller* and the current claim are homogeneous.

Dr. Garner, the authorized treating physician, opined within a reasonable degree of medical probability that the referral was reasonable and necessary medical treatment to cure and relieve the effects of claimant's work-related injury. In *Irigoyen*,⁶ a Board Member stated: "If respondent is arguing that the medical treatment provided to claimant was not reasonable and necessary, that would not be an issue over which the Board would take jurisdiction from a preliminary hearing." The Board has consistently held it has no jurisdiction to review an ALJ's preliminary order granting medical treatment and the respondent appeals on the basis that the ALJ exceeded his or her jurisdiction because the medical treatment is unreasonable or unnecessary.

When a record reveals the Board's lack of jurisdiction to review a question, the Board's authority extends no further than to dismiss the action.⁷ Accordingly, this Board Member dismisses the appeal of respondent. The issue of whether the ALJ erred by referring claimant to B&WH for a possible right arm transplant is moot.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

WHEREFORE, the undersigned Board Member dismisses the respondent's appeal and the December 27, 2011, preliminary hearing Order for Medical Treatment entered by ALJ Avery remains in full force and effect.

IT IS SO ORDERED.

⁶ *Irigoyen v. Moreno's Framing Company and Prohaska Construction Company, Inc.*, No.1,007,684, 2004 WL 1058390 (Kan. WCAB Apr. 27, 2004).

⁷ *State v. Rios*, 19 Kan. App. 2d 350, 869 P.2d 755 (1994).

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2010 Supp. 44-555c(k).

Dated this ____ day of March, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge